

1 JARED B. ANDERSON, ESQ. (SBN: 9747)
2 DAVID J. CHURCHILL, ESQ. (SBN: 7308)
3 **INJURY LAWYERS OF NEVADA**
4 4001 Meadows Lane
5 Las Vegas, Nevada 89107
Telephone: 702:868-8888
Facsimile: 702-868-8889
jared@injurylawyersnv.com
david@injurylawyersnv.com
Attorneys for Plaintiffs

6 UNITED STATES DISTRICT COURT

7 DISTRICT OF NEVADA

8 SEAN K. CLAGGETT & ASSOCIATES,
9 LLC D/B/A CLAGGETT & SYKES LAW
FIRM, A NEVADA LIMITED LIABILITY
COMPANY; SEAN K. CLAGGETT, AN
10 INDIVIDUAL,

11 Plaintiffs,

12 v.

13 DON C. KEENAN, AN INDIVIDUAL; D.C.
14 KEENAN & ASSOCIATES, P.A. D/B/A
KEENAN LAW FIRM, A GEORGIA
15 PROFESSIONAL ASSOCIATION;
KEENAN'S KIDS FOUNDATION, INC.,
D/B/A KEENAN TRIAL INSTITUTE
16 AND/OR THE KEENAN EDGE, A
GEORGIA NON-PROFIT CORPORATION;
BRIAN F. DAVIS, AN INDIVIDUAL;
17 DAVIS LAW GROUP, P.A., A NORTH
CAROLINA PROFESSIONAL
18 ASSOCIATION; DAVID J. HOEY, AN
INDIVIDUAL; TRAVIS E. SHETLER, AN
19 INDIVIDUAL; WILLIAM ENTREKIN, AN
INDIVIDUAL; DOES I-X; AND ROE
20 BUSINESS ENTITIES XI-XX, INCLUSIVE,

21 Defendants.

Case No. 2:21-cv-02237-GMN-DJA

22
23
24
**REPLY IN SUPPORT OF
PLAINTIFFS' MOTION TO REMAND**

1 Plaintiffs, SEAN K. CLAGGETT & ASSOCIATES, LLC d/b/a CLAGGETT &
 2 SYKES LAW FIRM and SEAN K. CLAGGETT, by and through their attorneys of record,
 3 Injury Lawyers of Nevada, hereby file their Reply in Support of Motion to Remand. This
 4 Reply is based upon the records and pleadings on file herein, the attached Memorandum of
 5 Points and Authorities, and any argument made by counsel at the hearing of this matter.

6 Dated this 4th day of February 2022.

7 INJURY LAWYERS OF NEVADA

8 */s/ Jared Anderson*

9 Jared B. Anderson, Esq. (SBN: 9747)
 10 David J. Churchill, Esq. (SBN: 7308)
 11 **INJURY LAWYERS OF NEVADA**
 12 4001 Meadows Lane
 13 Las Vegas, Nevada 89107

14 **INTRODUCTION**

15 This case arises out of Defendants' disparagement of Plaintiffs and intentional
 16 interference with the contractual relationship Claggett & Sykes Law Firm had with its client,
 17 Logan Erne, the plaintiff in the underlying personal injury lawsuit. A central figure in the
 18 effort to interfere with Claggett & Sykes' contractual relationship with Erne is Defendant
 19 Travis Shetler, a Nevada resident and attorney. Plaintiffs alleged three claims against Shetler
 20 for his role in the conspiracy to terminate Claggett & Sykes from the underlying case: (1)
 21 Intentional Interference with Contractual Relations; (2) Intentional Interference with
 22 Prospective Economic Advantage; and (3) Civil Conspiracy. ECF No. 12. Although
 23 Plaintiffs properly named Shetler as a defendant, Defendants removed this case to federal
 24 court. ECF No. 1. Plaintiffs filed their Motion to Remand on January 14, 2022. ECF No. 13.

On January 28, 2022, Defendants Brian F. Davis and Davis Law Group, P.A.
 ("Davis Defendants") filed their Opposition to Plaintiffs' Motion to Remand. ECF No. 22.

1 That same day, Defendants Keenan's Kids Foundation, Inc. and David J. Hoey filed their
2 Opposition and Joinder to Davis Defendants' Opposition. ECF No. 24. In their Opposition,
3 Defendants admit Defendant Travis Shetler is a Nevada resident and, thus, non-diverse from
4 Plaintiffs. *See* ECF 22 at 2:15-17 ("Each of the Defendants in this action are diverse from
5 both Plaintiffs with the exception of Defendant Travis Shetler"). Nevertheless, Defendants
6 maintain that diversity jurisdiction exists because Shetler was "fraudulently joined...for the
7 sole purpose of defeating diversity jurisdiction." *Id.* at 2:17-18.

8 The Court should take nothing from Defendants' Opposition and instead grant
9 Plaintiffs' Motion to Remand because Defendants failed to overcome the "strong
10 presumption against removal jurisdiction" and establish that removal is proper. *Hunter v.*
11 *Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009). In their Opposition, Defendants
12 were burdened with demonstrating Plaintiffs cannot possibly recover against Defendant
13 Shetler in Nevada State Court. *See Kruso v. Int'l Tel. & Tel. Corp.*, 872 F.2d 1416, 1426
14 (9th Cir. 1989). Defendants disregard this standard and instead ask the Court to assess the
15 merits of Plaintiffs' Amended Complaint, even going so far as to copy and paste whole
16 sections from their recently filed motion to dismiss. *Compare* ECF No. 22 at 7-15 *with* ECF
17 No. 16 at 7-14. However, "[s]uch a review...is not only inappropriate for a fraudulent
18 joinder determination, but the need for such a review itself reveals that the failure of
19 Plaintiff's claims is not 'obvious.'" *Ansara v. State Farm Fire & Cas. Co.*, 2015 U.S. Dist.
20 LEXIS 159365, *9 (Nov. 24, 2015) (citations omitted). Moreover, while Defendants
21 certainly dispute the allegations in Plaintiffs' Amended Complaint, at this stage, all disputed
22 questions of fact are resolved in Plaintiffs' favor. *See Kruso*, 872 F.2d at 1426. Therefore,
23 because Defendants fail to demonstrate that Plaintiffs' claims against Shetler will
24

1 ‘obviously’ fail, the Court should grant Plaintiffs’ motion and remand this matter back to
 2 state court.

3 **LEGAL ARGUMENT**

4 **I. DEFENDANTS FAILED TO DEMONSTRATE THAT PLAINTIFFS
 FRAUDULENTLY JOINED SHETLER TO THIS ACTION**

5 Although Defendants admit that Shetler is a non-diverse Defendant, they baselessly
 6 allege that “Plaintiffs merely named Mr. Shetler to avoid diversity jurisdiction.” ECF No. 22
 7 at 6:25. However, Defendants were burdened with demonstrating, “by clear and convincing
 8 evidence, either that there has been *outright fraud* committed in [Plaintiffs’] pleadings, or
 9 that there is no possibility, based on the pleadings, that [Plaintiffs] can state a cause of action
 10 against the non-diverse defendant in state court.” *Hamilton Materials, Inc. v. Dow Chem.*
 11 *Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007). (emphasis added).

12 Defendants improperly request that the Court determine merits of Plaintiffs’ claims
 13 at the pleading stage. “A standard that equates fraudulent joinder with Rule 12(b)(6)
 14 conflates a jurisdictional inquiry with an adjudication on the merits.” *GranCare, LLC*, 889
 15 F.3d at 549. Further, “[b]ecause the purpose of the fraudulent joinder doctrine is to allow a
 16 determination whether the district court has subject matter jurisdiction, the standard is
 17 similar to the ‘wholly insubstantial and frivolous’ standard for dismissing claims under Rule
 18 12(b)(1) for lack of federal question jurisdiction.” *Id.* (citations omitted). Here, the removing
 19 Defendants fall well short of satisfying their burden of fraudulent joinder or otherwise
 20 demonstrating that Plaintiffs committed *outright fraud* by making Defendant Shetler a party
 21 to this action.

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24 ///

1 **II. PLAINTIFFS PLEAD A COGNIZABLE CLAIM FOR INTENTIONAL
2 INTERFERENCE WITH CONTRACTUAL RELATIONS AGAINST
3 DEFENDANT SHETLER**

4 Plaintiffs' first claim against Shetler is for intentional interference with contractual
5 relations. "In an action for intentional interference with contractual relations, a plaintiff must
6 establish: (1) a valid and existing contract; (2) the defendant's knowledge of the contract; (3)
7 intentional acts intended or designed to disrupt the contractual relationship; (4) actual
8 disruption of the contract; and (5) resulting damage." *J.J. Indus., LLC v. Bennett*, 119 Nev.
9 269, 274, 71 P.3d 1264, 1267 (2003) (citing *Sutherland v. Gross*, 105 Nev. 192, 196, 772
10 P.2d 1287, 1290 (1989)). In their Opposition, Defendants include several arguments
11 regarding this claim, all of which are unavailing under the applicable standards.

12 **A. Plaintiffs had a Valid Contract with Erne**

13 Defendants first argue that Plaintiffs' claim for intentional interference with
14 contractual relations fails because "Plaintiffs' Agreement with Mr. Erne is illegal and void
15 because it violates NRS § 7.095." ECF No. 22 at 8:20-21. Defendants are incorrect for
16 several reasons.

17 First, Plaintiffs' claim is based, not only on Claggett & Sykes' written fee agreement
18 with Erne, but also on Claggett & Sykes' oral agreement with Erne to provide legal services
19 in exchange for compensation. *See* ECF No. 12 at ¶¶ 161 – 162 (noting that the "contract
20 between Plaintiff and the Las Vegas personal injury plaintiff was made in writing and
21 orally"). This contractual agreement between Claggett & Sykes and Erne "provided that
22 [Claggett & Sykes] would be paid for its services through either a contingency fee
23 arrangement or, alternatively, an hourly rate based on hours worked or, alternatively,
24 quantum meruit." *Id.* at ¶ 163. Defendants had knowledge of this contractual
relationship "because [Davis] referred the client to Plaintiff, was co-counsel on the case, and

1 executed a Joint Representation and Fee-Split Agreement that specifically incorporated by
 2 reference the Claggett & Sykes Contingency Fee Agreement with the client.” *Id.* at ¶ 164.
 3 Indeed, Defendants concede in their Opposition and in other filings before this Court that
 4 “[t]his Contingency Fee Agreement was an established contract....” *See* ECF No. 22 at
 5 14:3-4 (emphasis added); *see also* ECF No. 16 at 13:11-12. Defendants should be estopped
 6 from denying what they have admitted elsewhere, namely, that Plaintiffs had a valid and
 7 enforceable contractual relationship with Erne. *See Cannata v. Wyndham Worldwide Corp.*,
 8 798 F. Supp. 2d 1165, 1171 (D. Nev. 2011) (“Judicial estoppel is designed ‘not only to
 9 prevent a party from gaining an advantage by taking inconsistent positions, but also because
 10 of ‘general consideration[s] of the orderly administration of justice and regard for the dignity
 11 of judicial proceedings,’ and to ‘protect against a litigant playing fast and loose with the
 12 courts.’” (citation omitted).
 13

14 Second, NRS 7.095 applies only to contingent fee arrangements. *See* NRS 7.095.
 15 However, Plaintiffs’ fee agreement with Erne contained an alternative hourly fee structure:
 16 “Should litigation begin, and either a verdict is obtained in which Client is entitled to
 17 attorney fees, or if the client discharges The Firm, the Attorney’s Fee shall be the greater of
 18 the above contingency fee or the Attorney’s Hourly Rate whichever is greater.” ECF No. 22-
 19 1 at 1. Also, the fee agreement states that “[u]pon discharge of the Firm, Client shall
 20 immediately pay the Firm all costs advanced, and actual fees incurred for the work
 21 performed per hour, or the applicable contingency fee pursuant to the contingency fee
 22 structure on page 1 of this Contingency Fee Agreement, whichever is more.” *Id.* at 3. Thus,
 23 based on the plain language of the statute, NRS 7.095’s statutory cap does not apply to the
 24 hourly rate provisions in Claggett & Sykes’ fee agreement with Erne. *See Branch Banking &
 Trust Co. v. Windhaven & Tollway, LLC*, 131 Nev. 155, 158 (2015) (“In interpreting a

1 statute, this court looks to the plain language of the statute and, if that language is clear, this
 2 court does not go beyond it.”) (citation omitted).

3 Third, NRS 7.095’s fee cap applies only to actions “against a provider of health care
 4 based upon professional negligence[.]” *See* NRS 7.095(1). “Provider of health care” is
 5 defined in the statute as “a physician licensed under chapter 630 or 633 of NRS, dentist,
 6 registered nurse, dispensing optician, optometrist, registered physical therapist, podiatric
 7 physician, licensed psychologist, chiropractor, doctor of Oriental medicine, medical
 8 laboratory director or technician, licensed dietitian or a licensed hospital and its employees.”
 9 NRS 7.095(4)(b). In their opposition, Defendants ignore that the *Erne* case includes claims
 10 against defendants who fall outside NRS 7.095’s statutory definition of a “provider of health
 11 care”. *See* *Erne* Amended Complaint attached hereto as Exhibit 1 at 6-8 (detailing Erne’s
 12 common law negligence claim against counselors Margaret Williams, LCPC, and Marilyn
 13 Abel, CPC, as well as their employer, PHC of Nevada, Inc. dba Harmony Healthcare).
 14 These claims do not meet NRS 7.095’s statutory definition of a claim “against a provider of
 15 health care based upon professional negligence” and, so, the statute’s cap on attorney’s fees
 16 does not apply. *See, e.g., Szymborski v. Spring Mt. Treatment Ctr.*, 133 Nev. 638 (2017);
 17 *Deboer v. Sr. Bridges of Sparks Fam. Hosp.*, 128 Nev. 406, 411-412, 282 P.3d 727, 731-732
 18 (2012) (“a healthcare-based corporation’s status as a medical facility cannot shield it from
 19 other forms of tort liability when it acts outside the scope of medicine”).

20 Finally, Erne knowingly, intelligently, and voluntarily waived any potential
 21 applicability of NRS 7.095 when he executed the fee agreement with Claggett & Sykes.
 22 Waiver requires “an existing right, a knowledge of its existence, and an actual intention to
 23 relinquish it.” *McKeeman v. General Am Life Ins. Co.*, 111 Nev. 1042 (1995). Here, Erne
 24 knowingly, intelligently, and voluntarily waived his rights under NRS 7.095, both orally *and*

1 in writing. *See* ECF No. 22-1. Erne's waiver was valid as there is no language in Chapter 7
 2 of the Nevada Revised Statutes prohibiting or limiting attorneys from informing clients or
 3 potential clients about the statutory fee scheme under NRS 7.095 and asking them to waive
 4 it. The absence of any such language can be interpreted to be nothing other than intentional
 5 because there are other Chapters in the Nevada Revised Statutes that *do* expressly prohibit
 6 the waiver of statutory rights. *See, e.g.*, NRS 598.772 (“Waiver of statutory rights
 7 prohibits”...”Any waiver of a buyer of the provisions of NRS 598.746 to 598.777 inclusive,
 8 is contrary to public policy and is void and unenforceable”); *see also* NRS 108.2453
 9 (“Waiver or modification of right, obligation or liability set forth in NRS 108.221 to
 10 108.246, inclusive, prohibited...”). Based on the foregoing, Defendants have not
 11 demonstrated the absence of a valid and existing contract between Claggett & Sykes and
 12 Erne.

13 **B. Plaintiffs' Claim for Intentional Interference with Contractual Relations
 14 was Sufficiently Plead Within Nevada's Liberal Pleading Standard**

15 Next, Defendants attack the factual basis for Plaintiffs' intentional interference with
 16 contractual relations claim, alleging “Mr. Shetler's, Mr. Davis's, and Mr. Keenan's
 17 respective declarations irrefutably reflect the frivolous nature of Plaintiffs' allegation that
 18 Mr. Shetler intentionally interfered with the Agreement between Claggett & Sykes and Mr.
 19 Erne.” ECF No. 22 at 9:17-19. In doing so, Defendants ask that the Court delve into the facts
 20 of the case and decide all factual disputes in favor of the Defendants without allowing
 21 Plaintiffs the benefit of any discovery. However, as this Court has explained previously,
 22 “[s]uch a review...is not only inappropriate for a fraudulent joinder determination, but the
 23 need for such a review itself reveals that the failure of Plaintiff's claims is not ‘obvious.’”
 24 *Ansara*, 2015 U.S. Dist. LEXIS 159365 at *9 (citations omitted). Further, “a denial, even a
 sworn denial of allegations does not prove their falsity[.]” *Grancare, LLC*, 889 F.3d at 551.

1 As such, Defendants' declarations should be disregarded for purposes of determining
 2 whether remand is appropriate.

3 Further, Defendants mistakenly believe that Plaintiffs must plead their claims with
 4 particularity, even going so far as to complain that Plaintiffs have not identified "the specific
 5 who, what, where, why, or how of any of these allegations." ECF No. 22 at 12:4-5.
 6 However, Nevada's pleading standard, which is set forth in NRCP 8, states that a pleading
 7 need only contain "a short and plain statement of the claim showing that the pleader is
 8 entitled to relief[.]" NRCP 8(a). Nevada is a notice-pleading jurisdiction, and a pleading is
 9 sufficient so long as it gives fair notice of the nature and basis of the claim. *Crucil v. Carson*
 10 *City*, 95 Nev. 583, 585 (1979). In this regard, "the pleading of conclusions, either of law or
 11 fact, is sufficient so long as the pleading gives fair notice of the nature and basis of the
 12 claim." *Id.* Judged under this standard, the allegations contained in Plaintiffs' Amended
 13 Complaint adequately notice claims against Shetler and satisfy NRCP 8(a)'s liberal
 14 standard.

15 Moreover, Defendants' own declarations reveal substantial factual disputes which, at
 16 this stage, must be resolved in Plaintiffs' favor. *See Kruso*, 872 F.2d at 1426. Defendants
 17 allege that, "Mr. Erne terminated Claggett & Sykes on May 15, 2020." ECF No. 22 at 3:26.
 18 In fact, Mr. Erne did not personally terminate Claggett & Sykes until four days later, May
 19, 2020. *See* Email attached hereto as Exhibit 2. **Shetler admits that before that date, he
 20 had already spoken with Davis about replacing Claggett & Sykes as counsel for Erne.**
 21 *See* ECF No. 1-4 at ¶ 10 ("I had no knowledge of the Erne Matter or Claggett & Sykes'
 22 involvement in the Erne Matter until May 17, 2020, after Mr. Erne fired Claggett & Sykes.
 23 It was on this date when Defendant Brian Davis contacted me about substituting in as
 24 counsel in the Erne Matter."). Claggett & Sykes remained on as counsel of record for Erne

1 until May 29, 2020. *See* Substitution of Attorneys attached hereto as Exhibit 3. This timeline
 2 is consistent with the allegations contained in Plaintiff's Amended Complaint. *See, e.g.*, ECF
 3 No. 12 at ¶¶ 73 (alleging that "Defendant Shetler had communications with Defendant
 4 Keenan and/or Defendant Davis in furtherance of their conspiracy to interfere with
 5 Plaintiffs' contractual relationship with the client"). This, alone, demonstrates that it is
 6 possible for Plaintiffs to recover against Defendant Shetler in state court for intentional
 7 interference with contractual relations, intentional interference with prospective economic
 8 advantage, and civil conspiracy. *See, e.g.*, *J.J. Indus., LLC*, 119 Nev. at 275 ("At the heart
 9 of [an intentional interference] action is whether Plaintiff has proved *intentional acts by*
 10 *Defendant* intended or designed to disrupt Plaintiff's contractual relations....").

11 **C. Plaintiffs Incurred Damages as a Result of Defendants' Intentional
 12 Interference with Contractual Relations**

13 Finally, Defendants argue that "Plaintiffs' intentional interference claim must be
 14 dismissed because their alleged damages are too remote and speculative at this time." ECF
 15 No. 22 at 13:11-12. However, Plaintiffs incurred damages as a result of Defendants'
 16 intentional interference with Claggett & Sykes' contractual relations with Erne. As
 17 explained above, Claggett & Sykes' fee agreement with Erne provided that "**[u]pon
 18 discharge of the Firm, Client shall immediately pay the Firm all costs advanced, and
 19 actual fees incurred for the work performed per hour, or the applicable contingency
 20 fee pursuant to the contingency fee structure on page 1 of this Contingency Fee
 21 Agreement, whichever is more.**" ECF No. 22-1 at 3 (emphasis added). Claggett & Sykes
 22 has asserted a lien for fees and costs in the amount of \$288,512.06. *See* Notice of Lien
 23 attached hereto as Exhibit 4. To date, that entire amount remains outstanding and due as a
 24 result of Defendants' interference.

1 **III. Plaintiffs Plead a Cognizable Claim for Intentional Interference with**
 2 **Prospective Economic Advantage Against Defendant Shetler**

3 Plaintiffs' second claim against Shetler is for intentional interference with
 4 prospective economic advantage related to his efforts to interfere with Claggett & Sykes'
 5 ongoing and prospective contractual relationship with Erne. "Liability for the tort of
 6 intentional interference with prospective economic advantage requires proof of the
 7 following elements: (1) a prospective contractual relationship between the plaintiff and a
 8 third party; (2) knowledge by the defendant of the prospective relationship; (3) intent to
 9 harm the plaintiff by preventing the relationship; (4) the absence of privilege or justification
 10 by the defendant; and (5) actual harm to the plaintiff as a result of the defendant's conduct."

11 *Wichinsky v. Mosa*, 109 Nev. 84, 88-89 (1993) (citation omitted).

12 Defendants argue that this claim fails because Claggett & Sykes' fee agreement with
 13 Erne "was an established contract, not a prospective economic opportunity." ECF No. 22 at
 14 14:3-4. However, as a result of Defendants' wrongful and unjustified conduct, Claggett &
 15 Sykes "was harmed and denied fees and remuneration it otherwise would have been entitled
 16 to within its ongoing and prospective contractual relationship with the client." ECF No. 12
 17 at ¶ 199. In fact, Defendants concede earlier in their Opposition that Claggett & Sykes
 18 would have been entitled to a full contingency fee and/or additional hourly fees had Erne not
 19 terminated them. *See* ECF No. 22 at 13:1-5. Plaintiffs were denied these prospective
 20 economic benefits as a result of Defendants' intentional interference with Claggett & Sykes'
 21 relationship with Erne. *See* ECF No. 12 at ¶¶ 192-223.

22 Defendants further claim that Shetler "did nothing to prevent Plaintiffs from
 23 recovering their hourly fees or costs." ECF No. 22 at 14:7-8. As explained above, Shetler
 24 admits in his declaration that he discussed the *Erne* case with Defendant Davis prior to the
 date Erne terminated Claggett & Sykes. *Compare* ECF No. 1-4 at ¶ 10 with Email, Ex. 2;

1 Substitution of Attorney, Ex. 3. As a result of Defendants' intentional acts, Claggett &
 2 Sykes suffered damages, including additional prospective fees arising out of their
 3 relationship with Erne.

4 **IV. Plaintiffs Plead a Cognizable Claim for Civil Conspiracy Against Defendant
 Shetler**

5 Finally, Plaintiffs brought a claim against Shetler for civil conspiracy arising out of
 6 his concerted efforts with his Co-Defendants to have Claggett & Sykes Law Firm fired off
 7 the *Erne* case. In Nevada, “[a]n actionable civil conspiracy ‘consists of a combination of two
 8 or more persons who, by some concerted action, intend to accomplish an unlawful objective
 9 for the purpose of harming another, and damage results from the act or acts.’” *Consol.
 10 Generator-Nevada v. Cummins Engine Co.*, 114 Nev. 1304, 1311, 971 P.2d 1251, 1256
 11 (1998) (citations omitted). “A civil conspiracy claim operates to extend, beyond the active
 12 wrongdoer, liability in tort to actors who have merely assisted, encouraged or planned the
 13 wrongdoer’s acts.” *Flowers v. Carville*, 266 F. Supp. 2d 1245, 1249 (D. Nev. 2003) (citing
 14 16 AM.JUR. 2D, *Conspiracy*, § 57 (1998)). As the Supreme Court of California noted, “In
 15 such an action the major significance of the conspiracy lies in the fact that it renders each
 16 participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from
 17 the wrong, **irrespective of whether or not he was a direct actor and regardless of the
 18 degree of his activity.**” *Doctors' Co. v. Superior Court*, 49 Cal. 3d 39, 40 (1989) (emphasis
 19 added).

20 In their Opposition, Defendants repeat their denial of any wrongdoing. ECF No. 22
 21 at 14:28 – 15:2. However, as discussed above, Shetler has admitted to discussing the *Erne*
 22 matter with Defendant Davis on May 17, 2020, while Claggett & Sykes remained counsel of
 23 record for Erne. *See* ECF No. 1-4 at ¶ 10. Then, only days later, Erne reached out to

1 personally terminate Claggett & Sykes. *See Email, Ex. 2.* Simply, Defendants have not
2 demonstrated that Plaintiffs fraudulently joined Shetler. Instead, Defendants own proffered
3 timeline of events supports Plaintiffs' contention that Defendants conspired to have Claggett
4 & Sykes terminated off the *Erne* case. To the extent Defendants dispute Plaintiffs' factual
5 allegations, all disputed questions of fact are resolved in Plaintiffs' favor. *See Kruso*, 872
6 F.2d at 1426. Therefore, Defendants have not demonstrated that this Court has jurisdiction
7 over this case and, as such, the Court must remand this matter back to state court.

8 **CONCLUSION**

9 Based upon the foregoing, Plaintiffs respectfully request that the Court grant their
10 Motion to Remand in its entirety.

11 Dated this 4th day of February 2022.

12 INJURY LAWYERS OF NEVADA

13 /s/ *Jared Anderson*

14 _____
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20 **CERTIFICATE OF SERVICE**

21 XXXX

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15 This case arises out of Defendants' disparagement of Plaintiffs and intentional
16 interference with the contractual relationship Claggett & Sykes Law Firm had with its client,
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18 effort to interfere with Claggett & Sykes' contractual relationship with Erne is Defendant
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20 for his role in the conspiracy to terminate Claggett & Sykes from the underlying case: (1)
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17 No. 16 at 7-14. However, "[s]uch a review...is not only inappropriate for a fraudulent
18 joinder determination, but the need for such a review itself reveals that the failure of
19 Plaintiff's claims is not 'obvious.'" *Ansara v. State Farm Fire & Cas. Co.*, 2015 U.S. Dist.
20 LEXIS 159365, *9 (Nov. 24, 2015) (citations omitted). Moreover, while Defendants
21 certainly dispute the allegations in Plaintiffs' Amended Complaint, at this stage, all disputed
22 questions of fact are resolved in Plaintiffs' favor. *See Kruso*, 872 F.2d at 1426. Therefore,
23 because Defendants fail to demonstrate that Plaintiffs' claims against Shetler will
24

1 ‘obviously’ fail, the Court should grant Plaintiffs’ motion and remand this matter back to
 2 state court.

3 **LEGAL ARGUMENT**

4 **I. DEFENDANTS FAILED TO DEMONSTRATE THAT PLAINTIFFS
 FRAUDULENTLY JOINED SHETLER TO THIS ACTION**

5 Although Defendants admit that Shetler is a non-diverse Defendant, they baselessly
 6 allege that “Plaintiffs merely named Mr. Shetler to avoid diversity jurisdiction.” ECF No. 22
 7 at 6:25. However, Defendants were burdened with demonstrating, “by clear and convincing
 8 evidence, either that there has been *outright fraud* committed in [Plaintiffs’] pleadings, or
 9 that there is no possibility, based on the pleadings, that [Plaintiffs] can state a cause of action
 10 against the non-diverse defendant in state court.” *Hamilton Materials, Inc. v. Dow Chem.*
 11 *Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007). (emphasis added).

12 Defendants improperly request that the Court determine merits of Plaintiffs’ claims
 13 at the pleading stage. “A standard that equates fraudulent joinder with Rule 12(b)(6)
 14 conflates a jurisdictional inquiry with an adjudication on the merits.” *GranCare, LLC*, 889
 15 F.3d at 549. Further, “[b]ecause the purpose of the fraudulent joinder doctrine is to allow a
 16 determination whether the district court has subject matter jurisdiction, the standard is
 17 similar to the ‘wholly insubstantial and frivolous’ standard for dismissing claims under Rule
 18 12(b)(1) for lack of federal question jurisdiction.” *Id.* (citations omitted). Here, the removing
 19 Defendants fall well short of satisfying their burden of fraudulent joinder or otherwise
 20 demonstrating that Plaintiffs committed *outright fraud* by making Defendant Shetler a party
 21 to this action.

22 ///

23 ///

24 ///

1 **II. PLAINTIFFS PLEAD A COGNIZABLE CLAIM FOR INTENTIONAL**
 2 **INTERFERENCE WITH CONTRACTUAL RELATIONS AGAINST**
 3 **DEFENDANT SHETLER**

4 Plaintiffs' first claim against Shetler is for intentional interference with contractual
 5 relations. "In an action for intentional interference with contractual relations, a plaintiff must
 6 establish: (1) a valid and existing contract; (2) the defendant's knowledge of the contract; (3)
 7 intentional acts intended or designed to disrupt the contractual relationship; (4) actual
 8 disruption of the contract; and (5) resulting damage." *J.J. Indus., LLC v. Bennett*, 119 Nev.
 9 269, 274, 71 P.3d 1264, 1267 (2003) (citing *Sutherland v. Gross*, 105 Nev. 192, 196, 772
 10 P.2d 1287, 1290 (1989)). In their Opposition, Defendants include several arguments
 11 regarding this claim, all of which are unavailing under the applicable standards.

12 **A. Plaintiffs had a Valid Contract with Erne**

13 Defendants first argue that Plaintiffs' claim for intentional interference with
 14 contractual relations fails because "Plaintiffs' Agreement with Mr. Erne is illegal and void
 15 because it violates NRS § 7.095." ECF No. 22 at 8:20-21. Defendants are incorrect for
 16 several reasons.

17 First, Plaintiffs' claim is based, not only on Claggett & Sykes' written fee agreement
 18 with Erne, but also on Claggett & Sykes' oral agreement with Erne to provide legal services
 19 in exchange for compensation. *See* ECF No. 12 at ¶¶ 161 – 162 (noting that the "contract
 20 between Plaintiff and the Las Vegas personal injury plaintiff was made in writing and
 21 orally"). This contractual agreement between Claggett & Sykes and Erne "provided that
 22 [Claggett & Sykes] would be paid for its services through either a contingency fee
 23 arrangement or, alternatively, an hourly rate based on hours worked or, alternatively,
 24 quantum meruit." *Id.* at ¶ 163. Defendants had knowledge of this contractual
 25 relationship "because [Davis] referred the client to Plaintiff, was co-counsel on the case, and

1 executed a Joint Representation and Fee-Split Agreement that specifically incorporated by
 2 reference the Claggett & Sykes Contingency Fee Agreement with the client.” *Id.* at ¶ 164.
 3 Indeed, Defendants concede in their Opposition and in other filings before this Court that
 4 “[t]his Contingency Fee Agreement was an established contract....” See ECF No. 22 at
 5 14:3-4 (emphasis added); *see also* ECF No. 16 at 13:11-12. Defendants should be estopped
 6 from denying what they have admitted elsewhere, namely, that Plaintiffs had a valid and
 7 enforceable contractual relationship with Erne. *See Cannata v. Wyndham Worldwide Corp.*,
 8 798 F. Supp. 2d 1165, 1171 (D. Nev. 2011) (“Judicial estoppel is designed ‘not only to
 9 prevent a party from gaining an advantage by taking inconsistent positions, but also because
 10 of ‘general consideration[s] of the orderly administration of justice and regard for the dignity
 11 of judicial proceedings,’ and to ‘protect against a litigant playing fast and loose with the
 12 courts.’” (citation omitted)).

12 Second, NRS 7.095 applies only to contingent fee arrangements. *See* NRS 7.095.
 13 However, Plaintiffs’ fee agreement with Erne contained an alternative hourly fee structure:
 14 “Should litigation begin, and either a verdict is obtained in which Client is entitled to
 15 attorney fees, or if the client discharges The Firm, the Attorney’s Fee shall be the greater of
 16 the above contingency fee or the Attorney’s Hourly Rate whichever is greater.” ECF No. 22-
 17 1 at 1. Also, the fee agreement states that “[u]pon discharge of the Firm, Client shall
 18 immediately pay the Firm all costs advanced, and actual fees incurred for the work
 19 performed per hour, or the applicable contingency fee pursuant to the contingency fee
 20 structure on page 1 of this Contingency Fee Agreement, whichever is more.” *Id.* at 3. Thus,
 21 based on the plain language of the statute, NRS 7.095’s statutory cap does not apply to the
 22 hourly rate provisions in Claggett & Sykes’ fee agreement with Erne. *See Branch Banking &*
 23 *Trust Co. v. Windhaven & Tollway, LLC*, 131 Nev. 155, 158 (2015) (“In interpreting a

1 statute, this court looks to the plain language of the statute and, if that language is clear, this
 2 court does not go beyond it.”) (citation omitted).

3 Third, NRS 7.095’s fee cap applies only to actions “against a provider of health care
 4 based upon professional negligence[.]” *See* NRS 7.095(1). “Provider of health care” is
 5 defined in the statute as “a physician licensed under chapter 630 or 633 of NRS, dentist,
 6 registered nurse, dispensing optician, optometrist, registered physical therapist, podiatric
 7 physician, licensed psychologist, chiropractor, doctor of Oriental medicine, medical
 8 laboratory director or technician, licensed dietitian or a licensed hospital and its employees.”
 9 NRS 7.095(4)(b). In their opposition, Defendants ignore that the *Erne* case includes claims
 10 against defendants who fall outside NRS 7.095’s statutory definition of a “provider of health
 11 care”. *See* *Erne* Amended Complaint attached hereto as Exhibit 1 at 6-8 (detailing Erne’s
 12 common law negligence claim against counselors Margaret Williams, LCPC, and Marilyn
 13 Abel, CPC, as well as their employer, PHC of Nevada, Inc. dba Harmony Healthcare).
 14 These claims do not meet NRS 7.095’s statutory definition of a claim “against a provider of
 15 health care based upon professional negligence” and, so, the statute’s cap on attorney’s fees
 16 does not apply. *See, e.g., Szymborski v. Spring Mt. Treatment Ctr.*, 133 Nev. 638 (2017);
 17 *Deboer v. Sr. Bridges of Sparks Fam. Hosp.*, 128 Nev. 406, 411-412, 282 P.3d 727, 731-732
 18 (2012) (“a healthcare-based corporation’s status as a medical facility cannot shield it from
 19 other forms of tort liability when it acts outside the scope of medicine”).

20 Finally, Erne knowingly, intelligently, and voluntarily waived any potential
 21 applicability of NRS 7.095 when he executed the fee agreement with Claggett & Sykes.
 22 Waiver requires “an existing right, a knowledge of its existence, and an actual intention to
 23 relinquish it.” *McKeeman v. General Am Life Ins. Co.*, 111 Nev. 1042 (1995). Here, Erne
 24 knowingly, intelligently, and voluntarily waived his rights under NRS 7.095, both orally *and*

1 in writing. *See* ECF No. 22-1. Erne's waiver was valid as there is no language in Chapter 7
 2 of the Nevada Revised Statutes prohibiting or limiting attorneys from informing clients or
 3 potential clients about the statutory fee scheme under NRS 7.095 and asking them to waive
 4 it. The absence of any such language can be interpreted to be nothing other than intentional
 5 because there are other Chapters in the Nevada Revised Statutes that *do* expressly prohibit
 6 the waiver of statutory rights. *See, e.g.*, NRS 598.772 (“Waiver of statutory rights
 7 prohibits”...”Any waiver of a buyer of the provisions of NRS 598.746 to 598.777 inclusive,
 8 is contrary to public policy and is void and unenforceable”); *see also* NRS 108.2453
 9 (“Waiver or modification of right, obligation or liability set forth in NRS 108.221 to
 10 108.246, inclusive, prohibited...”). Based on the foregoing, Defendants have not
 11 demonstrated the absence of a valid and existing contract between Claggett & Sykes and
 12 Erne.

13 **B. Plaintiffs' Claim for Intentional Interference with Contractual Relations
 was Sufficiently Plead Within Nevada's Liberal Pleading Standard**

14 Next, Defendants attack the factual basis for Plaintiffs' intentional interference with
 15 contractual relations claim, alleging “Mr. Shetler's, Mr. Davis's, and Mr. Keenan's
 16 respective declarations irrefutably reflect the frivolous nature of Plaintiffs' allegation that
 17 Mr. Shetler intentionally interfered with the Agreement between Claggett & Sykes and Mr.
 18 Erne.” ECF No. 22 at 9:17-19. In doing so, Defendants ask that the Court delve into the facts
 19 of the case and decide all factual disputes in favor of the Defendants without allowing
 20 Plaintiffs the benefit of any discovery. However, as this Court has explained previously,
 21 “[s]uch a review...is not only inappropriate for a fraudulent joinder determination, but the
 22 need for such a review itself reveals that the failure of Plaintiff's claims is not ‘obvious.’”
 23 *Ansara*, 2015 U.S. Dist. LEXIS 159365 at *9 (citations omitted). Further, “a denial, even a
 24 sworn denial of allegations does not prove their falsity[.]” *Grancare, LLC*, 889 F.3d at 551.

1 As such, Defendants' declarations should be disregarded for purposes of determining
 2 whether remand is appropriate.

3 Further, Defendants mistakenly believe that Plaintiffs must plead their claims with
 4 particularity, even going so far as to complain that Plaintiffs have not identified "the specific
 5 who, what, where, why, or how of any of these allegations." ECF No. 22 at 12:4-5.
 6 However, Nevada's pleading standard, which is set forth in NRCP 8, states that a pleading
 7 need only contain "a short and plain statement of the claim showing that the pleader is
 8 entitled to relief[.]" NRCP 8(a). Nevada is a notice-pleading jurisdiction, and a pleading is
 9 sufficient so long as it gives fair notice of the nature and basis of the claim. *Crucil v. Carson*
 10 *City*, 95 Nev. 583, 585 (1979). In this regard, "the pleading of conclusions, either of law or
 11 fact, is sufficient so long as the pleading gives fair notice of the nature and basis of the
 12 claim." *Id.* Judged under this standard, the allegations contained in Plaintiffs' Amended
 13 Complaint adequately notice claims against Shetler and satisfy NRCP 8(a)'s liberal
 14 standard.

15 Moreover, Defendants' own declarations reveal substantial factual disputes which, at
 16 this stage, must be resolved in Plaintiffs' favor. *See Kruso*, 872 F.2d at 1426. Defendants
 17 allege that, "Mr. Erne terminated Claggett & Sykes on May 15, 2020." ECF No. 22 at 3:26.
 18 In fact, Mr. Erne did not personally terminate Claggett & Sykes until four days later, May
 19, 2020. *See* Email attached hereto as Exhibit 2. **Shetler admits that before that date, he
 20 had already spoken with Davis about replacing Claggett & Sykes as counsel for Erne.**
 21 *See* ECF No. 1-4 at ¶ 10 ("I had no knowledge of the Erne Matter or Claggett & Sykes'
 22 involvement in the Erne Matter until May 17, 2020, after Mr. Erne fired Claggett & Sykes.
 23 It was on this date when Defendant Brian Davis contacted me about substituting in as
 24 counsel in the Erne Matter."). Claggett & Sykes remained on as counsel of record for Erne

1 until May 29, 2020. *See* Substitution of Attorneys attached hereto as Exhibit 3. This timeline
 2 is consistent with the allegations contained in Plaintiff's Amended Complaint. *See, e.g.*, ECF
 3 No. 12 at ¶¶ 73 (alleging that "Defendant Shetler had communications with Defendant
 4 Keenan and/or Defendant Davis in furtherance of their conspiracy to interfere with
 5 Plaintiffs' contractual relationship with the client"). This, alone, demonstrates that it is
 6 possible for Plaintiffs to recover against Defendant Shetler in state court for intentional
 7 interference with contractual relations, intentional interference with prospective economic
 8 advantage, and civil conspiracy. *See, e.g.*, *J.J. Indus., LLC*, 119 Nev. at 275 ("At the heart
 9 of [an intentional interference] action is whether Plaintiff has proved *intentional acts by*
 10 *Defendant* intended or designed to disrupt Plaintiff's contractual relations....").

11 **C. Plaintiffs Incurred Damages as a Result of Defendants' Intentional
 12 Interference with Contractual Relations**

13 Finally, Defendants argue that "Plaintiffs' intentional interference claim must be
 14 dismissed because their alleged damages are too remote and speculative at this time." ECF
 15 No. 22 at 13:11-12. However, Plaintiffs incurred damages as a result of Defendants'
 16 intentional interference with Claggett & Sykes' contractual relations with Erne. As
 17 explained above, Claggett & Sykes' fee agreement with Erne provided that "**[u]pon
 18 discharge of the Firm, Client shall immediately pay the Firm all costs advanced, and
 19 actual fees incurred for the work performed per hour, or the applicable contingency
 20 fee pursuant to the contingency fee structure on page 1 of this Contingency Fee
 21 Agreement, whichever is more.**" ECF No. 22-1 at 3 (emphasis added). Claggett & Sykes
 22 has asserted a lien for fees and costs in the amount of \$288,512.06. *See* Notice of Lien
 23 attached hereto as Exhibit 4. To date, that entire amount remains outstanding and due as a
 24 result of Defendants' interference.

1 **III. Plaintiffs Plead a Cognizable Claim for Intentional Interference with**
 2 **Prospective Economic Advantage Against Defendant Shetler**

3 Plaintiffs' second claim against Shetler is for intentional interference with
 4 prospective economic advantage related to his efforts to interfere with Claggett & Sykes'
 5 ongoing and prospective contractual relationship with Erne. "Liability for the tort of
 6 intentional interference with prospective economic advantage requires proof of the
 7 following elements: (1) a prospective contractual relationship between the plaintiff and a
 8 third party; (2) knowledge by the defendant of the prospective relationship; (3) intent to
 9 harm the plaintiff by preventing the relationship; (4) the absence of privilege or justification
 10 by the defendant; and (5) actual harm to the plaintiff as a result of the defendant's conduct."

11 *Wichinsky v. Mosa*, 109 Nev. 84, 88-89 (1993) (citation omitted).

12 Defendants argue that this claim fails because Claggett & Sykes' fee agreement with
 13 Erne "was an established contract, not a prospective economic opportunity." ECF No. 22 at
 14 14:3-4. However, as a result of Defendants' wrongful and unjustified conduct, Claggett &
 15 Sykes "was harmed and denied fees and remuneration it otherwise would have been entitled
 16 to within its ongoing and prospective contractual relationship with the client." ECF No. 12
 17 at ¶ 199. In fact, Defendants concede earlier in their Opposition that Claggett & Sykes
 18 would have been entitled to a full contingency fee and/or additional hourly fees had Erne not
 19 terminated them. *See* ECF No. 22 at 13:1-5. Plaintiffs were denied these prospective
 20 economic benefits as a result of Defendants' intentional interference with Claggett & Sykes'
 21 relationship with Erne. *See* ECF No. 12 at ¶¶ 192-223.

22 Defendants further claim that Shetler "did nothing to prevent Plaintiffs from
 23 recovering their hourly fees or costs." ECF No. 22 at 14:7-8. As explained above, Shetler
 24 admits in his declaration that he discussed the *Erne* case with Defendant Davis prior to the
 date Erne terminated Claggett & Sykes. *Compare* ECF No. 1-4 at ¶ 10 with Email, Ex. 2;

1 Substitution of Attorney, Ex. 3. As a result of Defendants' intentional acts, Claggett &
 2 Sykes suffered damages, including additional prospective fees arising out of their
 3 relationship with Erne.

4 **IV. Plaintiffs Plead a Cognizable Claim for Civil Conspiracy Against Defendant
 Shetler**

5 Finally, Plaintiffs brought a claim against Shetler for civil conspiracy arising out of
 6 his concerted efforts with his Co-Defendants to have Claggett & Sykes Law Firm fired off
 7 the *Erne* case. In Nevada, “[a]n actionable civil conspiracy ‘consists of a combination of two
 8 or more persons who, by some concerted action, intend to accomplish an unlawful objective
 9 for the purpose of harming another, and damage results from the act or acts.’” *Consol.
 10 Generator-Nevada v. Cummins Engine Co.*, 114 Nev. 1304, 1311, 971 P.2d 1251, 1256
 11 (1998) (citations omitted). “A civil conspiracy claim operates to extend, beyond the active
 12 wrongdoer, liability in tort to actors who have merely assisted, encouraged or planned the
 13 wrongdoer’s acts.” *Flowers v. Carville*, 266 F. Supp. 2d 1245, 1249 (D. Nev. 2003) (citing
 14 16 AM.JUR. 2D, *Conspiracy*, § 57 (1998)). As the Supreme Court of California noted, “In
 15 such an action the major significance of the conspiracy lies in the fact that it renders each
 16 participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from
 17 the wrong, **irrespective of whether or not he was a direct actor and regardless of the**
 18 **degree of his activity.**” *Doctors' Co. v. Superior Court*, 49 Cal. 3d 39, 40 (1989) (emphasis
 19 added).

20 In their Opposition, Defendants repeat their denial of any wrongdoing. ECF No. 22
 21 at 14:28 – 15:2. However, as discussed above, Shetler has admitted to discussing the *Erne*
 22 matter with Defendant Davis on May 17, 2020, while Claggett & Sykes remained counsel of
 23 record for Erne. *See* ECF No. 1-4 at ¶ 10. Then, only days later, Erne reached out to

1 personally terminate Claggett & Sykes. *See* Email, Ex. 2. Simply, Defendants have not
2 demonstrated that Plaintiffs fraudulently joined Shetler. Instead, Defendants own proffered
3 timeline of events supports Plaintiffs' contention that Defendants conspired to have Claggett
4 & Sykes terminated off the *Erne* case. To the extent Defendants dispute Plaintiffs' factual
5 allegations, all disputed questions of fact are resolved in Plaintiffs' favor. *See Kruso*, 872
6 F.2d at 1426. Therefore, Defendants have not demonstrated that this Court has jurisdiction
7 over this case and, as such, the Court must remand this matter back to state court.

8

CONCLUSION

9 Based upon the foregoing, Plaintiffs respectfully request that the Court grant their
10 Motion to Remand in its entirety.

11 Dated this 4th day of February 2022.

12 INJURY LAWYERS OF NEVADA

13 /s/ *Jared Anderson*

14 Jared B. Anderson, Esq. (SBN: 9747)
15 David J. Churchill, Esq. (SBN: 7308)
16 **INJURY LAWYERS OF NEVADA**
17 4001 Meadows Lane
18 Las Vegas, Nevada 89107
19
20
21
22
23
24

CERTIFICATE OF SERVICE

I certify that on the 4th day of February, 2022, I served a true and correct copy of the above and foregoing **REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO REMAND** on the parties via the Court's Electronic filing system to all parties listed in CM/ECF service listed for this case:

/s/Lili Salonga

An employee of Injury Lawyers of Nevada